

Michael's Enterprises and United Disposal of Bradley, Inc. and International Brotherhood of Teamsters, Local 705, AFL-CIO.¹ Case 33-CA-8836(E)

January 19, 1993

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On March 27, 1992, Administrative Law Judge Robert M. Schwarzbart issued the attached decision on application for award of attorneys' fees and expenses. The Applicant filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

On October 24, 1990,² the judge issued an order, on motion of the General Counsel, dismissing the complaint in the underlying unfair labor practice case. On December 21, the Applicant filed an application for an award of attorneys' fees and expenses under the Equal Access to Justice Act (EAJA).³ The judge thereafter dismissed the EAJA application as untimely filed. For the reasons set forth below, we find the instant EAJA application to have been timely filed.

EAJA Section 504(a)(2) provides that a party seeking attorney's fees and other costs "shall, within thirty days of a final disposition in the adversary adjudication, submit to the [Board] an application which shows that the party is a prevailing party." This statutory filing period is reflected in Section 102.148(a) of the Board's Rules and Regulations, which provides that "[a]n application may be filed . . . in no case later than 30 days after the entry of the Board's final order in that proceeding."

The statute's 30-day filing period is a jurisdictional prerequisite to application under EAJA, and we are without authority to extend that filing period beyond 30 days. *All Shores Radio Co.*, 286 NLRB 394, 396 (1987), *affd.* 841 F.2d 474 (2d Cir. 1988). The critical issue in this case is how to determine, under Board Rule Section 102.148(a), the date of the final order in the underlying unfair labor practice proceeding, at which time the 30-day statutory filing period commences.⁴

Section 102.27 of the Board's Rules and Regulations provides that, as in this case, on motion an administrative law judge may dismiss a complaint prior to issuance of a decision. Section 102.27 further provides that a party may file for review by the Board of such an order to dismiss, and "[u]nless [a] request for review is filed within 28 days from the date of the order of dismissal, the case shall be closed." No request for review of the judge's order dismissing the complaint was filed in this case.

In *Columbia Mfg. Corp.*,⁵ the Board considered the same issue posed in this case, i.e., the determination of the date of the final order in a proceeding in which the judge issues an order dismissing complaint, and no request for review is filed. The Board cited the provision in Section 102.27 that, when no party files a request for review of the judge's dismissal order, "the case shall be closed." In light of the latter provision, the Board concluded that, in the absence of a request for review, the judge's dismissal order becomes the final order in the unfair labor practice case, and that an EAJA application must be filed within 30 days from the date the judge issued the dismissal order.

The judge in this case applied the rule of *Columbia Mfg. Corp.* and explained that the EAJA application was filed on December 21, well after expiration of the 30-day period for filing following the judge's dismissal order of October 24. The judge accordingly dismissed the application as untimely filed, and did not consider the merits of the Applicant's EAJA application.⁶

On reexamination of the analysis in *Columbia Mfg. Corp.*, we cannot affirm the rationale that Section 102.27's provision that the case shall be closed unless there is a request for review renders the date of the judge's dismissal order the date of the final order in the proceeding. Rather, Section 102.27 makes clear that a party has 28 days to file a request for review by the Board following issuance of the judge's dismissal order. We find that the availability of review by the Board during the 28-day period precludes a finding that the date of the judge's dismissal order constitutes the final disposition of the proceeding. See *Dole v. Phoenix Roofing*, 922 F.2d 1202, 1206-1207 (5th Cir. 1991) (there can be no final disposition of a case triggering the 30-day EAJA filing period until the entire decision is final and unappealable).

We are additionally mindful of the uncertainty that the *Columbia Mfg.* rule works on an EAJA applicant. As the Applicant argues in its exceptions, a prevailing party may be uncertain whether a request for review will in fact be filed for 28 days following the judge's

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² All dates are in 1990.

³ 5 U.S.C. § 504.

⁴ We note that Sec. 102.148(a) employs the term "final order" while EAJA Sec. 504(a)(2) refers to the "final disposition" of the proceeding. We find no distinction between the two terms, and for purposes of clarity we will employ only the term "final order."

⁵ 265 NLRB 109 (1982), *affd.* 715 F.2d 1409 (9th Cir. 1983).

⁶ We correct the judge's inadvertent reference to the application having been filed 61 days after the judge's dismissal order. The instant application was filed 58 days after the judge issued his order dismissing complaint.

dismissal order, and will have only 2 days for timely filing the EAJA application if a request for review is not filed.⁷ The Applicant thus contends that it is forced to prepare the EAJA application prior to the expiration of the 28-day period to ensure that it may be timely filed; yet if a request for review is indeed filed, the date of the dismissal order is no longer the final order in the proceeding. Further, if the request for review is found meritorious by the Board, the applicant is no longer the prevailing party, yet it has been forced to prepare an EAJA application to ensure compliance with the rule in *Columbia Mfg. Corp.*

For these reasons, we hold that when a judge, pursuant to Section 102.27, issues an order dismissing the complaint and no party files a request for review, we shall deem that order to be the final order in the case at the date of the expiration of the 28-day period permitted for filing a request for review of the judge's dismissal order. Thus, at the expiration of the 28-day period, if no request for review has been filed, the 30-day statutory filing period under EAJA shall commence. To the extent that the decision in *Columbia Mfg. Corp.* is inconsistent with our holding today, it is overruled.

Applying our holding today to the instant case, we find that the Applicant's EAJA application was timely filed. The judge's dismissal order here was filed on October 24. The period for filing a request for review expired 28 days thereafter, on November 21. In the absence of a request for review, the dismissal order is deemed the final order in the proceeding as of the expiration of the 28-day period—here, November 21—and the EAJA application may be timely filed up to 30 days thereafter. The instant EAJA application was filed on December 21, precisely 30 days following the expiration of the period for filing a request for review.

We accordingly find that the Applicant's EAJA application was timely filed, and remand the proceeding to the administrative law judge for consideration of the merits of the EAJA application.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Robert M. Schwarzbart for consideration of the merits of the Applicant's application for an award of fees and expenses under the Equal Access to Justice Act.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings, conclusions, and a recommended Order; and that, following the service of the supplemental decision on the parties, the provisions of Sec-

⁷ We recognize that the rule in *Columbia Mfg. Corp.* is premised on the earlier version of Sec. 102.27 which provided only 10 days for the filing of a request for review. The 1986 revision of that section extended the filing period to 28 days.

tion 102.154 of the Board's Rules and Regulations shall be applicable.

Will Vance, Esq., for the General Counsel.

Karl W. Grabemann and David B. Montgomery, Esqs. (Murphy, Smith & Polk), of Chicago, Illinois, for the Applicant.
David Mathews, Esq. (Carmell, Charone, Widmer, Mathews & Moss), of Chicago, Illinois, for the Charging Party.

DECISION ON APPLICATION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. On a complaint issued pursuant to charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 705, AFL-CIO (the Union), alleging that Michael's Enterprises and United Disposal of Bradley, Inc., as a single-integrated business enterprise and single employer within the meaning of the Act, violated Section 8(a)(1), (3), and (5) of the Act, a hearing commenced before me in Kankakee, Illinois. At the hearing, the answer, which denied the commission of unfair labor practices, was amended to admit the single-employer status of Michael's Enterprises and United Disposal of Bradley, Inc. (the Applicant), and the complaint allegations alleging violation of Section 8(a)(3) of the Act were resolved on terms unfavorable to the Applicant and withdrawn. The hearing was adjourned prior to the taking of testimony.¹

On October 24, 1990, granting the General Counsel's September 12, 1990 motion, contested by the Union, I issued an order dismissing the complaint and closing the hearing. My October 24 order was not appealed.

Thereafter, on December 21, 1990, the Respondent filed with the Board an application for fees and expenses under the Equal Access to Justice Act (EAJA), Pub. L. 96-481, Stat. 2325 and Section 102.43 of the Board's Rules and Regulations. The Board referred this application to me by order, dated December 26, 1990. The General Counsel filed written motion to dismiss the application, received January 22, 1991, and in separate documents, both dated February 6, 1991, the Applicant replied to the General Counsel's motion to dismiss and amended the application for fees.

For the reasons set forth below, I find that the Applicant did not timely file the application for fees and that, therefore, the application must be dismissed.²

Discussion and Conclusions

EAJA Section 504(a)(2), 5 U.S.C. § 504(a)(2) (1982), provides that:³

¹ The relevant early docket entries are as follows:

The charge and first amended charge were filed on September 19 and December 4, 1989, respectively. The complaint was issued on December 5, 1989, and the hearing was conducted on May 16 and 17, 1990.

² The timeliness of the filing of the application for fees was not addressed by the parties.

³ See *Monark Boat Co.*, 262 NLRB 994 (1982), aff'd. 708 F.2d 1322 (8th Cir. 1983).

A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section.

The Board's Rules and Regulations, Section 102.148(a), specifies that:

An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award shall be filed in triplicate with the Board in Washington, DC, together with a certificate of service. . . .

Accordingly, under EAJA and the Board's procedural Rules issued pursuant thereto, a party must submit its application for fees within 30 days of final judgment. Where, as in the present matter, no request for review was filed to my October 24 order dismissing the complaint and closing the hearing, that order, in accordance with Section 102.27 of the

Board's Rules and Regulations became the final disposition.⁴ Section 102.27 provides for the dismissal (on motion) by an administrative law judge prior to issuance of a decision, and for review of such an order to dismiss. Under that section, the request for review must be filed within 28 days from the date of the order of dismissal or the case shall be closed. Since no party in the present matter filed a request for review of my October 24 order dismissing the complaint and closing the hearing, that order became the final disposition of the underlying unfair labor practice case. As the Applicant's application was filed with the Board on December 21, it was received 61 days after the final disposition. Since the Applicant failed to comply with the jurisdictional time period specified in EAJA Section 504(a)(2), I am without authority to consider the merits of the application and am compelled to recommend that the application for fees be dismissed for lack of jurisdiction.⁵

[Recommended Order omitted from publication.]

⁴ See *Columbia Mfg. Corp.*, 265 NLRB 109 (1982), aff'd. 715 F.2d 1409 (9th Cir. 1983).

⁵ *Columbia Mfg. Corp.*, supra; *T. E. Elevator Corp.*, 268 NLRB 1461 fn. 1 (1984). As noted in *T. E. Elevator*, supra, the 30-day period for filing an EAJA application commences the date the administrative law judge's order issues dismissing the complaint.